

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
	)	IB Docket No. 05-220
Use of Returned Spectrum in the 2 GHz	)	
Mobile Satellite Service Frequency	)	IB Docket No. 05-221
Bands	)	
	)	File Nos. SAT-PPL-2050926-00184
Inmarsat Global Limited	)	SAT-PDR-20050926-00184
Petition For Declaratory Ruling to	)	SAT-AMD-20051116-00221
Provide Mobile Satellite Service to the	)	
United States Using the 2 GHz and	)	
Extended Ku-Bands	)	

**COMMENTS OF T-MOBILE USA, INC.**

Sara F. Leibman  
Robert G. Kidwell  
Mintz, Levin, Cohn, Ferris, Glovsky  
and Popeo, P.C.  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004  
(202) 434-7300

Of Counsel

February 16, 2006

Thomas J. Sugrue  
Vice President, Government Affairs  
Kathleen O'Brien Ham  
Managing Director,  
Federal Regulatory Affairs  
Patrick T. Welsh  
Corporate Counsel,  
Federal Regulatory Affairs

T-MOBILE USA, INC.  
401 Ninth Street, N.W.  
Suite 550  
Washington, D.C. 20004  
(202) 654-5900

## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>INTRODUCTION AND SUMMARY.....</b>	<b>1</b>
<b>I. THE ADMINISTRATIVE PROCEDURE ACT REQUIRES REASONED AGENCY DECISIONMAKING IN ANY CONTEXT .....</b>	<b>3</b>
<b>II. THERE IS NO SUPPORT IN THE RECORD FOR A GRANT OF THE ENTIRE 2 GHZ BAND TO ICO AND TMI.....</b>	<b>6</b>
<b>A. The 2 GHz MSS Order Relies on Faulty Assumptions .....</b>	<b>6</b>
<b>B. The Commission Ignored Realistic Alternatives.....</b>	<b>9</b>
<b>CONCLUSION .....</b>	<b>12</b>

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
	)	IB Docket No. 05-220
Use of Returned Spectrum in the 2 GHz	)	
Mobile Satellite Service Frequency	)	IB Docket No. 05-221
Bands	)	
	)	File Nos. SAT-PPL-2050926-00184
Inmarsat Global Limited	)	SAT-PDR-20050926-00184
Petition For Declaratory Ruling to	)	SAT-AMD-20051116-00221
Provide Mobile Satellite Service to the	)	
United States Using the 2 GHz and	)	
Extended Ku-Bands	)	

**COMMENTS OF T-MOBILE USA, INC.**

Pursuant to the Federal Communications Commission's ("FCC's" or "Commission's") Public Notice<sup>1/</sup> in the above-captioned proceeding, T-Mobile USA, Inc. ("T-Mobile") hereby submits these comments in support of the Petition for Reconsideration of Inmarsat Ventures Limited and Inmarsat Global Limited ("Inmarsat"), filed on January 9, 2006 ("Inmarsat Petition").

**INTRODUCTION AND SUMMARY**

As a nationwide, all-digital provider of commercial mobile radio services ("CMRS"), T-Mobile has a strong interest in the Commission's allocation and assignment of scarce spectrum, particularly when the band at issue is adjacent to, and is ideally suited for use as, a terrestrial wireless band. As the number of wireless subscribers continues to grow to nearly 200 million, with almost two-thirds of Americans

---

<sup>1/</sup> Report No. 2752, 71 FR 5339 (February 1, 2006).

utilizing wireless telephony,<sup>2/</sup> and 97 percent of the population living in a county with three or more wireless competitors,<sup>3/</sup> the spectrum crunch facing CMRS providers in the face of increasing consumer demand is real. CMRS spectrum shortages could very well impact consumer choice in the not so distant future.

In contrast, the need for additional Mobile Satellite Services (“MSS”) spectrum in the 2 GHz band is unproven, with no evidence of consumer demand and an industry record of failure to utilize assigned spectrum.<sup>4/</sup> It was therefore arbitrary and capricious for the Commission to ignore the comments of numerous entities and “throw good spectrum after bad.” For independent carriers like T-Mobile, moreover, the Commission’s action was particularly damaging given that recent Commission-approved wireless mergers have resulted in available spectrum being consolidated among three major competitors. T-Mobile requires additional spectrum at the earliest possible date in order to continue growing its customer base and rolling out new advanced wireless technologies.

T-Mobile therefore strongly supports Inmarsat’s request that the Commission reconsider its decision to allocate the entire 2 GHz band to an MSS duopoly that currently provides no service and may never provide any service desired by consumers. T-Mobile further urges the Commission to re-open this proceeding for full notice-and-

---

<sup>2/</sup> See *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Tenth Report, WT Docket No. 05-71, FCC 05-173, at ¶ 5 (rel. September 30, 2005) (“*Tenth Annual CMRS Report*”) (recounting subscriber numbers as of December 2004).

<sup>3/</sup> *Id.* at ¶ 2.

<sup>4/</sup> See *Use of Returned Spectrum in the 2 GH Mobile Satellite Services Frequency Bands*, Order, IB Docket Nos. 05-220 and 05-221, FCC 05-204, ¶¶ 2-3 (rel. December 9, 2005) (“*2 GHz MSS Order*”).

comment rulemaking to determine how best to allocate and assign the remaining 2 GHz spectrum in the public interest.

## **I. THE ADMINISTRATIVE PROCEDURE ACT REQUIRES REASONED AGENCY DECISIONMAKING IN ANY CONTEXT**

The Commission has cast this proceeding as a license modification under section 316 of the Communications Act,<sup>5/</sup> rather than as a rulemaking of general applicability.<sup>6/</sup> In its comments, CTIA reminded the Commission that, “in order to sustain the proposed spectrum giveaway as a license modification, it must provide a rational basis for concluding that the modification is in the public interest.”<sup>7/</sup> In other words, the Commission’s decision to proceed under section 316 rather than in the context of notice-and-comment rulemaking does not somehow free it from Administrative Procedure Act (“APA”) strictures.

The *2 GHz MSS Order* addresses CTIA’s APA argument in a single sentence: “We agree with CTIA that Section 316 requires the Commission to find that Section 316 modifications are in the public interest.”<sup>8/</sup> While T-Mobile does not dispute the Commission’s discretion to proceed by rulemaking or adjudication, in making a public interest finding in either case, it must consider relevant data and articulate an explanation establishing a “rational connection between the facts found and the choice made.”<sup>9/</sup> An

---

<sup>5/</sup> 47 U.S.C. § 316.

<sup>6/</sup> *2 GHz MSS Order* at ¶ 16 (“In the *First 2 GHz MSS Public Notice*, the Commission stated that, in the event it chose to reassign any spectrum to ICO and TMI, it would modify their reservations of spectrum using procedures consistent with those under Section 316 of the Communications Act.”).

<sup>7/</sup> Comments of CTIA at 8 (citing *Motor Veh. Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>8/</sup> *2 GHz MSS Order* at ¶ 19.

<sup>9/</sup> *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 626 (1986).

agency's action is arbitrary or capricious if it has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>10/</sup> “The requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result.”<sup>11/</sup>

Under these precedents, the *2 GHz MSS Order* cannot withstand APA scrutiny, as it relies upon unrealistic assumptions,<sup>12/</sup> fails to fully consider rational suggestions,<sup>13/</sup> and arrives at an unsupported conclusion that is contrary to any reasonable interpretation of the record evidence. In addition, the *2 GHz MSS Order* flatly contradicts clear Commission precedent and Congressional intent that, save for exceptional cases, radio spectrum be licensed through auction.

As discussed by several commenters in this proceeding, most notably CTIA,<sup>14/</sup> Commission decisions in other similar situations provide no support for the course taken in the *2 GHz MSS Order*. To the contrary, the Commission has recently emphasized that “the granting of valuable spectrum rights . . . to any party . . . without recourse to the

---

<sup>10/</sup> *Motor Veh. Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also County of L.A. v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) (announcing that “[w]here the agency has failed to provide a reasoned explanation, or where the record belies the agency’s conclusion, [the court] must undo its action”).

<sup>11/</sup> *Pub. Citizen, Inc. v. Fed. Aviation Admin.*, 988 F.2d 186, 197 (D.C. Cir. 1993).

<sup>12/</sup> *See infra* section II.A.

<sup>13/</sup> *See infra* section II.B.

<sup>14/</sup> Comments of CTIA-The Wireless Association, IB Docket No. 05-220, at 15-16 (file July 13, 2005) (“Comments of CTIA”).

competitive bidding process is highly unusual.”<sup>15/</sup> It did so in the context of finding a *valid* exception to that rule, which granted to Nextel Communications 10 megahertz of spectrum in the 1.9 GHz band to relocate its operations away from, and thereby limit interference with, critical public safety operations.<sup>16/</sup> Even in those exigent circumstances, the Commission still required “anti-windfall” payments from Nextel.<sup>17/</sup>

The Commission has likewise noted that “we are mindful that Congress has expressed a strong statutory preference in the vast majority of circumstances for use of auctions to assign spectrum rights.”<sup>18/</sup> In fact, Congress has specifically directed that the Commission safeguard the public interest through “recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource.”<sup>19/</sup> Contrary to this unambiguous Congressional directive, however, the 2 GHz *MSS Order* inexplicably went beyond merely granting ICO’s and TMI’s requests for free additional spectrum, and instead bestowed upon them the entire band at no cost and with no justification. Particularly in light of the willingness of CMRS carriers—including T-Mobile—to pay handsomely for this spectrum, the Commission’s gift of the entire 2 GHz

---

<sup>15/</sup> *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, 19 FCC Rcd 14969, 15112 ¶ 297 (2004) (“800 MHz Order”).

<sup>16/</sup> *Id.* at 15010-15011 ¶¶ 62-64.

<sup>17/</sup> *Id.* at 15011 ¶ 64.

<sup>18/</sup> *Id.* at 15081 ¶ 213.

<sup>19/</sup> 47 U.S.C. § 309(j)(3)(C). Recognizing the high value placed on spectrum, and in order to “promote efficient spectrum use,” the Administration has likewise proposed a Spectrum License User Fee in its 2006 budget proposal that would begin in 2007 and collect \$3.1 billion by 2017. *See* President’s 2006 Budget Proposal at 330, available at <http://www.whitehouse.gov/infocus/budget/2006/toc.html>

band to two firms that do not currently offer a service to the public contradicts the letter and purpose of section 309(j).

## **II. THERE IS NO SUPPORT IN THE RECORD FOR A GRANT OF THE ENTIRE 2 GHZ BAND TO ICO AND TMI**

### **A. The 2 GHz MSS Order Relies on Faulty Assumptions**

The Inmarsat Petition correctly points out that the *2 GHz MSS Order* rests upon several assumptions that are unsupported in the record: first, that other service providers already have adequate spectrum; second, that TMI should be given more 2 GHz spectrum because it does not hold any other MSS interests; and third, that the award of all of the additional 2 GHz spectrum to TMI and ICO will produce public safety and rural broadband benefits that otherwise would not exist. None of these assumptions is valid.

The Commission's casual dismissal of other providers' need for spectrum is belied by reality. The *2 GHz MSS Order* suggests that other MSS providers are in no need of additional spectrum, and ignores completely the evidence demonstrating a spectrum shortage for terrestrial wireless carriers. With respect to the latter, the *2 GHz MSS Order* disposes in a single paragraph of the entire body of record evidence documenting how the public would best be served by reallocating the 2 GHz band. That paragraph that does not even discuss the issue of CMRS spectrum scarcity, much less weigh the public interest benefits of granting a 2 GHz duopoly to TMI and ICO against those of meeting consumer demand for terrestrial wireless service.<sup>20/</sup>

As T-Mobile and CTIA discussed in their comments, existing CMRS providers have an urgent need for additional spectrum and would place a high value on any portion

---

<sup>20/</sup> *2 GHz MSS Order* at ¶ 53.



of the 2 GHz band allocated to them.<sup>21/</sup> As an independent CMRS provider and the smallest of the four major national providers, T-Mobile has a particularly acute need for these frequencies in order to continue to compete aggressively and roll out advanced services. Indeed, through recent Commission-approved mergers and acquisitions, much of the spectrum now allocated to CMRS has become concentrated in the hands of T-Mobile's larger competitors, thereby underscoring the importance of ensuring, to the extent possible, that all spectrum is being put to its highest and best use.

The Inmarsat Petition likewise describes the high value that other MSS providers would place on the 2 GHz spectrum if given the opportunity.<sup>22/</sup> Given these competing demands for a portion of the 2 GHz spectrum, it was arbitrary and capricious for the 2 *GHz MSS Order* to nonetheless grant to TMI and ICO the entire 2 GHz band—*30 percent more spectrum than they even asked the Commission to grant them*—an unjustified windfall when viewed from any angle.

Further, as Inmarsat describes in detail in its Petition, the notion that TMI is not an “existing MSS service provider” and does not already have extensive spectrum resources is simply incorrect.<sup>23/</sup> TMI is party to a joint venture with Motient that provides a combined Canadian-American regional MSS service utilizing 26 MHz of L-band spectrum.<sup>24/</sup> In any event, Motient is in the process of acquiring TMI's 2 GHz business through its subsidiary TerreStar. As a result, Motient – the successor-in-interest

---

<sup>21/</sup> Comments of T-Mobile at 8; Comments of CTIA at 3-4.

<sup>22/</sup> Inmarsat Petition at 5-7.

<sup>23/</sup> *Id.* at 7.

<sup>24/</sup> *Id.* at 8 (citing *Motient Services Inc. and TMI Communications and Company, LP, Assignors and Mobile Satellite Ventures Subsidiary LLC, Assignee*, 16 FCC Rcd 20469, 20469-71 (2001)).

to TMI – will have access to nearly double the spectrum of any other MSS provider in North America.<sup>25/</sup>

Similarly, the *2 GHz MSS Order*'s suggestion that the grant of a 2 GHz duopoly to TMI and ICO would serve the public interest by bolstering public safety and expanding rural broadband service is wholly unsupported. As Inmarsat points out, there is no analysis in the *2 GHz MSS Order*, nor any demonstration in the record, of how increasing TMI's and ICO's spectrum assignments by 250 percent would benefit first responders.<sup>26/</sup> Likewise, in its separate petition,<sup>27/</sup> Globalstar contrasts its own contributions to public safety during the events of September 11, 2001 and the 2005 Gulf hurricanes (and its need for additional spectrum to meet existing and growing demand by government public safety entities) with ICO's and TMI's complete lack of any role in public safety and the dearth of evidence that public safety entities will ever rely on either firm.

Finally, as demonstrated by the extraordinary measures taken by the Commission in the *800 MHz Order*, public safety first responders depend first and foremost on terrestrial wireless spectrum contiguous with CMRS spectrum, in addition to relying upon CMRS services themselves, and any relief that the Commission could provide to spectrum crowding in existing terrestrial wireless bands would have an immediate and beneficial effect on public safety. The duopoly grant in the *2 GHz MSS Order*, by

---

<sup>25/</sup> *Id.* at 8-9.

<sup>26/</sup> *Id.* at 9.

<sup>27/</sup> Petition of Globalstar for Reconsideration, IB Docket Nos. 05-220 and 05-221, at 8-10 (filed January 9, 2006).

contrast, assures that the 2 GHz band will not be available for public safety uses for at least several years, and may never become part of the public safety infrastructure.<sup>28/</sup>

## **B. The Commission Ignored Realistic Alternatives**

In the face of numerous comments identifying the irrationality of throwing good spectrum after bad, the 2 GHz *MSS Order* inexplicably concluded that “[w]hen the Commission allocated this spectrum to MSS, it determined that doing so furthered the public interest.”<sup>29/</sup> The Commission’s finding that “[n]one of the commenters have explained why the unassigned spectrum at issue in this proceeding warrants a different result”<sup>30/</sup> is irreconcilable with the record, which provides myriad reasons for declining to grant a 2 GHz duopoly to ICO and TMI.

The Inmarsat Petition accurately recounts that the Commission “specifically sought comment on alternatives to reassigning the entire 2 GHz band to TMI and ICO.”<sup>31/</sup> In its comments, T-Mobile highlighted the fact that the 2 GHz frequencies at issue in the proceeding are directly adjacent to the Personal Communications Service (“PCS”) bands and the new Advanced Wireless Service (“AWS”) bands, and are therefore well-suited to use by existing CMRS licensees.<sup>32/</sup> CTIA confirmed that the propagation characteristics of the 2 GHz band and its proximity to PCS and AWS make this band highly valuable

---

<sup>28/</sup> The 2 GHz *MSS Order*’s finding that “increasing ICO’s and TMI’s spectrum reservations would increase their capacity to provide broadband services in rural areas” is no better supported, and the Commission provides no concrete discussion of how the grant of a 2 GHz duopoly would enable rural broadband any better than any other allocation. *See* Inmarsat Petition at 11-12.

<sup>29/</sup> 2 GHz *MSS Order* at ¶ 53.

<sup>30/</sup> *Id.*

<sup>31/</sup> *Id.* at 12.

<sup>32/</sup> Comments of T-Mobile at 7-8.

from the perspective of terrestrial wireless providers.<sup>33/</sup> Cingular likewise recommended that the Commission reallocate the unused portion of the band “in light of record evidence that the spectrum is highly valued for other services, including AWS.”<sup>34/</sup>

Intel contrasted the “over nine billion dollars in bids” that would likely be submitted for this spectrum were it auctioned for terrestrial wireless use with the “MSS industry’s struggle for viability,” and described how the terrestrial wireless industry’s higher market valuation reflects their more efficient use of the spectrum – “an efficiency that promotes consumer welfare.”<sup>35/</sup> As The Wall Street Journal recently reported, to the extent that MSS providers actually have any business plans, they involve using MSS spectrum for terrestrial purposes.<sup>36/</sup> Gary Parsons, Chairman of MSV (which will soon be consolidated with TMI under the Motient umbrella, much as Motient is already in the process of acquiring the 2 GHz spectrum at issue in this proceeding<sup>37/</sup>), told The Wall Street Journal that “he expects the vast majority of future MSV phone traffic to travel over its still-to-be-built cellular network.”<sup>38/</sup> Mr. Parsons’ revelation to the investment community is telling of the true destiny of the spectrum bestowed by the Commission in

---

<sup>33/</sup> Comments of CTIA at 3-4.

<sup>34/</sup> Reply Comments of Cingular Wireless LLC in IB Docket 05-220 and Comments in IB Docket 05-221 at 6-7 (filed July 25, 2005) (“Cingular Reply Comments”).

<sup>35/</sup> Reply Comments of Intel at 9. Although different from the suggestion of T-Mobile, CTIA, Cingular, and Intel, Inmarsat likewise “proposed various alternatives that would advance the public interest more than licensing only two entities in the nascent 2 GHz band.” Inmarsat Petition at 12.

<sup>36/</sup> Jesse Drucker, *As Satellite Firms Move to Add Cellular Service, Critics Cry Foul*, Wall St. J., Feb. 9, 2006, at A1.

<sup>37/</sup> See Inmarsat Petition at 8.

<sup>38/</sup> See Drucker, *As Satellite Firms Move to Add Cellular Service, Critics Cry Foul*.

the 2 GHz MSS Order and unequivocally contradicts the Commission's finding that its action here is in the public interest.<sup>39/</sup>

In an instance such as this, when the factual basis upon which a Commission decision resulting from notice and comment rulemaking – such as the decision allocating the 2 GHz band for MSS – is no longer valid, the Commission is obliged to reexamine its prior conclusion.<sup>40/</sup> As described above, the record before the Commission unquestionably demonstrates that (1) consumer demand for terrestrial wireless service is strong and growing; (2) terrestrial wireless spectrum is scarce; (3) the 2 GHz band is ideally suited for provision of terrestrial wireless service; (4) the robust MSS service that the Commission thought would be ignited by allocating spectrum for MSS has failed to materialize, leaving this valuable spectrum to lie fallow now and for the foreseeable future; (5) the Commission has traditionally disfavored granting large blocks of valuable spectrum without an auction; and (6) Congress has directed the Commission to use the auction mechanism to secure for the public a portion of the value of spectrum granted for commercial use. The very last outcome that this record could reasonably support is granting all of the remaining 2 GHz spectrum to an ICO/TMI duopoly.

---

<sup>39/</sup> “Mr. Parsons says MSV is unlikely to enter the retail telecommunications market itself. The likeliest option is that it will provide the spectrum for a larger company, perhaps getting an equity investment from a large telecommunications provider. Or, he adds, ‘We could be bought outright.’” Drucker, *As Satellite Firms Move to Add Cellular Service, Critics Cry Foul*.

<sup>40/</sup> See, e.g., *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (“In the rulemaking context . . . it is well settled law that an agency may be forced to reexamine its approach ‘if a significant factual predicate of a prior decision . . . has been removed’”) (citing *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981)). See also *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (D.C. Cir. 1995) (holding that it was error not to reexamine structural separation requirement for cellular licenses after factual predicate found to be no longer valid).

## CONCLUSION

For the reasons set forth above, T-Mobile respectfully requests that the Commission grant the Inmarsat Petition and reopen this proceeding for full notice-and-comment rulemaking to determine how best to allocate and assign the remaining 2 GHz spectrum in the public interest.

Respectfully submitted,

T-MOBILE USA, INC.

Sara F. Leibman  
Robert G. Kidwell  
Mintz, Levin, Cohn, Ferris, Glovsky  
and Popeo, P.C.  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004  
(202) 434-7300

Of Counsel

February 16, 2006

/s/\_\_\_\_\_  
Thomas J. Sugrue  
Vice President, Government Affairs  
Kathleen O'Brien Ham  
Managing Director,  
Federal Regulatory Affairs  
Patrick T. Welsh  
Corporate Counsel,  
Federal Regulatory Affairs

T-MOBILE USA, INC.  
401 Ninth Street, N.W.  
Suite 550  
Washington, D.C. 20004  
(202) 654-5900